

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TRAVELL BRADFORD,

CV NO. 08-644-HU

Plaintiff,

v.

FINDINGS AND RECOMMENDATION

CLACKAMAS COUNTY, et al.,

Defendants.

Travell Bradford
8848100
2605 State Street
Salem, Oregon 97310
Pro se

Kathleen J. Rastetter
Clackamas County Counsel
2051 Kaen Road
Oregon City, Oregon 97045
Attorney for defendants

HUBEL, Magistrate Judge:

This is a civil rights action based on use of excessive force, brought by Travell Bradford, a prisoner at the Oregon State Penitentiary. Defendant Clackamas County has been dismissed from the case; the remaining defendants are individuals Gary Bergerson, Gregory Senior, Mark Moore, and Robert Dunkle. On September 16,

1 2009, I entered Findings and a Recommendation that Bradford's
2 motion for "default summary judgment" (doc. # 10) be denied.
3 Defendants now bring their own motion for summary judgment (doc. #
4 86).

5 **Standard**

6 A party is entitled to summary judgment if the "pleadings,
7 depositions, answers to interrogatories, and admissions on file,
8 together with affidavits, if any, show there is no genuine issue as
9 to any material fact." Fed. R. Civ. P. 56(c). Summary judgment is
10 not proper if genuine issues of material fact exist for trial.
11 Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995). A
12 genuine dispute arises "if the evidence is such that a reasonable
13 jury could return a verdict for the nonmoving party." State of
14 California v. Campbell, 319 F.3d 1161, 1166 (9th Cir. 2003). The
15 mere existence of *some* issue of alleged factual dispute does not
16 defeat an otherwise properly supported motion for summary judgment;
17 the requirement is that there be no *genuine* issue of *material*
18 *fact*. Scott v. Harris, 550 U.S. 372, 380 (2007) (emphasis in
19 original) ("When opposing parties tell two different stories, one of
20 which is blatantly contradicted by the record, so that no
21 reasonable jury could believe it, a court should not adopt that
22 version of the facts for purposes of ruling on a motion for summary
23 judgment.")

24 **Discussion**

25 Bradford alleged in his complaint that on May 31, 2006, Deputy
26 Senior injured him in an unprovoked physical attack while he was
27

1 being transferred from the Clackamas County Jail to Coffee Creek
2 Correctional Facility. Bradford claims that Senior struck him in
3 the stomach with his fist several times, choked him, and engaged in
4 verbal threats and abuse. He alleges further that Deputy Moore and
5 Sergeant Dunkle observed the incident, but did not intervene.

6 Deputy Senior has submitted a declaration stating that as they
7 approached the transfer area, Bradford began to turn around and
8 push back against him, then trying to spin out of Senior's grip.
9 Senior Declaration ¶ 4. Senior denies that he choked, punched, hit,
10 dragged or slammed Bradford into anything, and denies that he
11 communicated any racial or religious slurs to him. Id. at ¶¶ 8, 9.
12 Senior states that at no time did Bradford complain to him of being
13 hurt, and did not appear to be injured as a result of the takedown.
14 Id. at ¶ 10.

15 Moore states in his declaration that Bradford refused to exit
16 his cell in a timely manner for transport, and as a result Senior
17 had to escort him from his cell block to the transfer area. Moore
18 Declaration ¶ 3. Moore states that he saw Bradford pushing back
19 against Senior and refusing to walk forward, but says he did not
20 see Senior take Bradford to the floor. Id. at ¶ 7. Moore also says
21 he did not see Senior choke, punch, hit, drag or slam Bedford, and
22 did not hear any racial or religious slurs made to Bradford. Id. at
23 ¶¶ 9, 10. According to Moore, Bradford did not complain at any time
24 of being hurt and did not appear injured. Id. at ¶ 11.

25 Dunkle states that he saw Bradford resisting Senior and trying
26 to pull away. Senior then took Bradford to the ground
27

1 "momentarily," and returned Bradford to his feet. Dunkle at ¶ 6.
2 Bradford appeared uninjured. Id. Dunkle says that in his opinion,
3 Senior used an appropriate amount of force to gain control of
4 Bradford, and that he did not see anyone else physically assault
5 Bradford or hear any racial or religious slurs. Id. at ¶¶ 7-10.
6 Dunkle states that he did not hear Bradford complain of being hurt,
7 and that he did not appear to be injured. Id. at ¶ 11.

8 Bergerson states in his declaration that Bradford resisted
9 Senior, but that he was not present when Senior took Bradford to
10 the floor. Bergerson Declaration ¶ 4, 6. Bergerson says he saw
11 Bradford in the transfer area after the alleged incident and did
12 not observe any sign of injury. Id. at ¶ 12.

13 Defendants have filed, under seal, a videotape, without sound,
14 of the events at issue. They argue that no reasonable jury could
15 conclude from the evidence that Senior used excessive force on
16 plaintiff, so that they are entitled to summary judgment. Bradford
17 has countered with unsworn statements denying defendants' versions
18 of the facts and their interpretation of the videotape. I viewed
19 the videotape and I cannot say that no reasonable juror could
20 conclude that Senior used excessive force on plaintiff while they
21 were out of sight of the camera in the supply room. Nor does the
22 videotape reveal unequivocally the extent of the force Senior used
23 either on Bradford's neck or in the takedown. I conclude that a
24 genuine issue of material fact precludes summary judgment in
25 Senior's favor.

26 However, with respect to Deputies Moore and Bergerson and
27

1 Sergeant Dunkle, Bradford has alleged only that they observed the
2 events at issue and did nothing to intervene.

3 In order for a person acting under color of state law to be
4 liable under § 1983, there must be a showing of personal
5 participation in the alleged rights deprivation. Jones v. Williams,
6 297 F.3d 930, 934 (9th Cir. 2002); Taylor v. List, 880 F.2d 1040,
7 1045 (9th Cir. 1989). Bradford has not produced evidence of
8 personal participation that would support the personal liability of
9 Dunkle, Moore and Bergerson under an excessive force claim. Nor can
10 § 1983 liability be based on respondeat superior. Monell v. Dep't
11 of Social Services, 436 U.S. 658, 692-94 (1978); King v. Atiyeh,
12 814 F.2d 565, 568 (9th Cir. 1987). A supervisor may be liable based
13 on his own participation in a deprivation, Hansen v. Black, 885
14 F.2d 642, 646 (9th Cir. 1989), but a "supervisor is only liable for
15 the constitutional violation of his subordinates if the supervisor
16 participated in or directed the violations, or knew of the
17 violations and failed to act to prevent them." Taylor, 880 F.2d at
18 1045 (9th Cir. 1989).

19 Conclusion

20 I recommend that defendants' motion for summary judgment (doc.
21 #) be DENIED with respect to defendant Senior, and GRANTED with
22 respect to defendants Bergerson, Dunkle and Moore.

23 Scheduling Order

24 These Findings and Recommendation will be referred to a
25 district judge. Objections, if any, are due June 14, 2010. If no
26 objections are filed, then the Findings and Recommendation will go
27

1 under advisement on that date. If objections are filed, then a
2 response is due July 1, 2010. When the response is due or
3 filed, whichever date is earlier, the Findings and Recommendation
4 will go under advisement.

5 Dated this 26th day of May, 2010.

6
7 s/ Dennis James Hubel

8 Dennis James Hubel
9 United States Magistrate Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27